

STATE OF SOUTH CAROLINA)	BEFORE THE CHIEF PROCUREMENT OFFICER
COUNTY OF RICHLAND)	
)	
In the Matter of Contract Controversy of:))	DECISION
)	
In the matter of a Protest of:)	
)	CASE No. 2008-120
Harper Auction & Realty)	
)	
v.)	
)	
Budget and Control Board)	
Division of General Services)	
)	
Materials Management Office)	POSTING DATE:
RFP No. 07-S7285)	
RFP No. 5400000291)	
<u>Real Estate Auctioneering Services</u>)	July 28, 2008

This matter is before the Chief Procurement Officer (CPO) pursuant to a letter from Harper Auction & Realty (Harper). In 2007, the Materials Management Office (MMO) issued request for proposals (RFP) number 07-S7285 entitled Real Estate Auctioneer Services on behalf of the Budget and Control Board, Division of General Services (DGS). After evaluation, MMO posted the award to Harper for a contract for a little more one year with three one-year extension options. At the conclusion of the first term, DGS advised Harper that it was not exercising its option to extend the contract into year two. Instead, DGS submitted a requisition to MMO asking for a new solicitation.

Harper forwarded a letter to the CPO filing both a request for resolution of a contract controversy regarding its contract awarded pursuant to RFP No. 07-S7285 under SC Code section 11-35-4230 and a protest of RFP No. 5400000291 under SC Code section 11-35-4210 arguing that the award to Fisher Auction Company (Fisher) is void due to the improper cancellation of the previous contract.

Since Mr. Harper filed the matters in a single letter and requested relief of reinstatement of the previous contract as well as declaration that the new award to Fisher be null and void, the CPO conducted both hearings in a single day, July 18, 2008. Appearing before the CPO were Harper, represented by Mike Harper, Auctioneer/Broker in Charge; DGS, represented by Ed Dickson, Director of Real Property Services; and MMO, represented by John Stevens, State Procurement Officer. Fisher did not appear.

Harper's letter offers six filed claims, two related to the termination of the previous contract (Issues 2 and 6) and four related to the protest of the new award to Fisher (Issues 1, 3, 4, and 5). The aspects of Harper's letter will be addressed separately below.

NATURE OF PROTEST

Harper's letter is attached and incorporated herein by reference.

FINDINGS OF FACT

The following dates are relevant to the protest:

1. On July 27, 2006, MMO published RFP No. 07-S7285 entitled Auctioneering Services for Real Estate. [Ex. 1]
2. On August 11, 2006, MMO published Amendment No. 1. [Ex. 2]
3. On August 16, 2006, MMO published Amendment No. 2. [Ex. 3]
4. On August 31, 2006, MMO opened the proposals received including Harper's. [Ex. 4]
5. On September 11, 2006, MMO posted an intent to award to Harper. [Ex. 6]
6. On December 21, 2007, in a letter to Harper, Mr. Roberson wrote, "The term of our contract with your company expires on December 31, 2007, and we have elected not to extend this time period." [Ex. 9]
7. On March 28, 2008, MMO published RFP No. 5400000291. [Ex. 25]

8. On May 16, 2008, MMO posted an intent to award to Fisher Auction Company, Inc. [Ex. 31]
9. On May 27, 2008, the CPO received the letter from Harper.

THE CONTROVERSY – ISSUES 2 AND 6

In Issue Number 2, Harper alleged, “My prior contract was terminated without cause and having been in effect less than one year at the date of termination.”

According to the RFP, the effective date of the contract was “From the date of award (September 22, 2006¹) through December 31, 2007.” The contract did provide for three additional one-year renewal options if the contract “be extended by mutual agreement of the parties and execution of a written amendment.” [Ex. 1, p.19, Term of Contract]

On December 21, 2007, Mr. Roberson wrote Mr. Harper a letter advising him, “The term of our contract with your company expires on December 31, 2007, and we have elected not to extend this time period.” [Ex. 9]

DGS did not “terminate” the contract with Harper. Rather, DGS chose not to exercise its option to extend the contract beyond the initial contract period, as authorized under the contract.²

In Issue Number 6, Harper alleged “I was never paid an agreed-upon administrative “no sale” fee of \$5,000.00 that was agreed to prior to my advertising for the sale of the Sullivan’s Island Quartermasters Warehouse and Dock property in July 2007.” Mr. Harper wrote further, “that I be treated as the “Procuring Cause” of the pending contract with the Town of Sullivan’s Island for the purchase of the Quartermaster’s Warehouse and Dock in the amount of \$1,960,000, and that my contract commission (less the \$5,000.00 administrative “no-sale” fee) be paid to me upon closing.”

¹ The original intent to award to Harper was posted on September 11, 2006, but it was stayed by a protest. The intent was reinstated effective September 22, 2006.

² See, generally, Steven W. Feldman, Government Contract Awards: Negotiation & Sealed Bidding § 5.13 (Clark Boardman Callaghan 2007) (addressing objections to governments decision not to exercise options).

Mr. Harper's request relates to a piece of real estate in Sullivan's Island that the state has considered selling for some time, the Quartermaster's Warehouse and Dock. Recently, the Budget and Control gave the Town of Sullivan's Island an option on the property in order to allow the town time to seek federal funds to support the purchase. Most recently, on May 13, 2008, the Board "approved the Town's offer to purchase the property at 1602 Thompson Boulevard for \$1,960,000 prior to March 31, 2009, contingent on the sale of the Battery Logan property to the U.S. Department of Interior." [Ex. 12] Harper requests a "no sale" fee and a brokerage fee as the procuring cause for the property.

Harper's contract with DGS provides that, "The Budget and Control Board General Services Division desires to contract for the services of a professional, licensed Auctioneer who is also a licensed Real Estate Broker to market and auction certain real estate designated by General Services throughout the term of the awarded contract." The contract further provides that, "The Contractor (Auctioneer) will be responsible for all aspects of listing, marketing, promoting, advertising, and selling all property designated by General Services for auction." Regarding commissions to the auctioneer to be paid by the state, the contract reads, "If the sale of the property fails to be completed for any reason within forty days of the auction, no compensation will be due the Auctioneer from the State." [Ex. 1, p. 10] [Emphasis added]

In this case, no sale has occurred, no auction was conducted. Accordingly, no commission is due Harper.

Harper claims a brokerage fee as the procuring cause for the property. Mr. Harper argued his actions in marketing the property prompted the Town to pursue it. However, the contract awarded Harper expressly provides that "[i]f the sale of the property fails to be completed for any reason within forty days of the auction, no compensation will be due the Auctioneer from the State." No auction ever took place. More importantly, no sale has taken place. Even if it had, Harper failed to prove that it was

the procuring cause for the proposed sale of the property to the Town of Sullivan's Island. According to DGS, the Town of Sullivan had desired the property for decades.

Regarding the "no sale" fee of \$5,000, Harper argued that he submitted an engagement protocol that DGS agreed to, which provided for Harper to be paid a "no sale" fee on properties assigned to Harper but not actually sold. Correspondence from Harper to DGS does propose a "no sale" fee; however, Harper produced no evidence to prove that DGS agreed to the proposed fee.³ In fact, Mr. Harper stated, "No, I did not get written approval that I would get an administrative fee." He stated further, "We talked about it, but it fell through the cracks."

THE PROTEST – ISSUES 1, 3, 4, AND 5

In Issue No. 1, Harper alleged that award of the new solicitation should be decided based upon Section 11-35-1524, the state's preference for vendors who are residents of South Carolina. However, the Code excepts procurements conducted under Section 11-35-1530 of the Code, the source selection method utilized in this procurement. [11-35-1524(D)(5)] Therefore, the resident vendor preference is inapplicable to this solicitation.

In Issue No. 3, Harper alleged that he was not notified of the new solicitation. Harper wrote, "I was never notified in any form of the re-advertisement for such services, and was aggrieved by that failure." Mr. Harper points to the letter from Richbourg Roberson, Director of General Services, dated December 21, 2007, in which Mr. Roberson wrote, "If we elect to re-bid for auctioneering services in the future, we will notify you of that solicitation." Harper argues that the statement created an obligation under the Code to notify Harper of the new solicitation. Assuming, for the sake of argument, that Mr. Roberson's letter created an obligation for the state, any error was harmless. Harper submitted

³ Only MMO's procurement manager was authorized to modify the contract. No such modification was submitted into evidence.

a proposal for the new solicitation, evidencing the fact that Harper received actual notice of the new solicitation. Simply, Harper was not aggrieved by any lack of notice from Mr. Roberson.

In Issue No. 4, Harper alleged that “I have received no notification either by mail, telephone or email about the award of this contract.” Mr. Harper withdrew this issue during the hearing.

In Issue No. 5, Harper alleged, “I maintain that my qualifications are equal to or better than the company awarded the contract” asserting that his company should receive the award. However, an evaluation committee determined Fisher’s proposal, not Harper’s proposal, to be most advantageous to the state. According to the Code, such determination is final and conclusive unless proven to be arbitrary, capricious, contrary to law or clearly erroneous. [11-35-2410] No conclusive evidence has been received to prove any such conclusion. Harper merely argues that it is equally qualified as Fisher. The Procurement Review Panel has ruled previously that a protestant’s naked allegation that its qualifications are superior to the selected offeror is inadequate to gain the award. The Panel wrote:

Travelsigns alleges it offered the procurement most advantageous to the state, and attempts to explain why its proposal is superior to the proposal ranked highest by the State. The determination of what is most advantageous to the State can only be determined by the State. An offeror's claim to be superior to other offerors is fruitless because the Panel has consistently held that it will not substitute its judgment for the judgment of the evaluation committee, which determines the ranking of the offerors. See, Case No. 1992-16, In re: Protest of Coastal Rapid Public Transit authority and Case No. 1994-11, In re: Protest of First Sun EAP Alliance. Inc., The decision of the evaluators may be attacked as arbitrary, capricious, erroneous, or biased, but the Panel will not re-evaluate the proposals. (Protest of Travelsigns, Case No. 1995-8.)

Harper’s Allegation that it has qualifications equal Fisher’s is insufficient to prove that the evaluation was arbitrary, capricious, contrary to law or clearly erroneous.

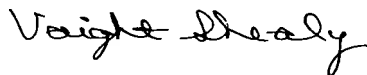
DETERMINATION

Regarding the contract controversy, the CPO finds that Harper has failed to prove by the preponderance of the evidence that DGS breached the contract awarded to Harper pursuant to RFP No.

07-S7285. Thus no additional fee are due Harper. Regarding the “no sale” fee of \$5,000, Harper produced no evidence to support agreement by the state. In fact, Mr. Harper stated, “No, I did not get written approval that I would get an administrative fee.” According to DGS, Harper was paid \$1,136.76, the only reimbursement request submitted by Harper. No further fee or commission is due.

Regarding the protest, the CPO finds that Harper has failed to prove by the preponderance of the evidence that DGS or MMO violated the Code in any way in the solicitation and award of RFP No. 5400000291. As a matter of law, the resident vendor preference is inapplicable to an RFP, the source selection method employed by MMO in this case. As demonstrated by its timely submission of a proposal and a protest, Harper had actual notice of both the solicitation and the award. Even if the state failed in some duty to give notice (and the CPO finds no such duty), any error was harmless. As for the evaluation, no evidence was presented to establish that the process was arbitrary, capricious, contrary to law, or clearly erroneous.

The contract controversy and the protest are denied.



R. Voight Shealy
Chief Procurement Officer
for Supplies and Services

July 28, 2008

Date

Columbia, S.C.

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

The South Carolina Procurement Code, in Section 11-35-4210, subsection 6, states:

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected by the decision requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of posting of the decision in accordance with subsection (5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel or to the Procurement Review Panel, and must be in writing, setting forth the reasons for disagreement with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and an affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or judicial.

Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: www.procurementlaw.sc.gov

FILE BY CLOSE OF BUSINESS: Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

FILING FEE: Pursuant to Proviso 66.1 of the 2007 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410(4). . . . Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." 2007 S.C. Act No. 117, Part IB, § 66.1. PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, a business must retain a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003).

HARPER AUCTION & REALTY

"Experience Sells"

Mike Harper

Auctioneer / Broker-in-Charge

Chief Procurement Officer
Material Management Office
State Procurement Office
1201 Main St., Suite 600
Columbia, SC 29201

Protest of Award # 4400000127
Auctioneering Services for Real Estate

May 23, 2008

Dear CPO:

In accordance with Section 11-35-4210 I hereby protest the award of the contract for Real Estate Auctioneer Services RFP # 5400000291 which has been awarded to Fisher Auction Company of Pompano Beach FL. This letter is a motion to protest and appeal by Michael B. Harper, DBA Harper Auction & Realty for the following enumerated reasons:

1. **SC Resident Vendor Preference:** Section 11 35-1524 establishes a preference for vendors who are residents of South Carolina. While the criteria for the preference is written with manufacturing rather than service companies in mind, it is clear that the spirit of this statute is served by giving preference to a South Carolina sole proprietorship entity over a "National" Corporation.
2. **Unjustified Termination of prior contract:** My prior contract was terminated without cause and having been in effect less than one year at the date of termination. Further, my termination was for political reasons rather than for just cause. I incurred the personal animosity of General Services Director M. Richbourg Roberson by seeking clarification from the Chairman of the Budget and Control Board when I was unable to get such clarification (or indeed a returned phone call) from him.
3. **No notification of re-advertisement:** I received a letter from December 21, 2007 from M. Richbourg Roberson stating in part..."If we elect to re-bid for auctioneer services in the future, we will notify you of that solicitation." In fact, I was never notified in any form of the re-advertisement for such services, and was aggrieved by that failure to honor the terms of that letter.

984 Sea Gull Dr.
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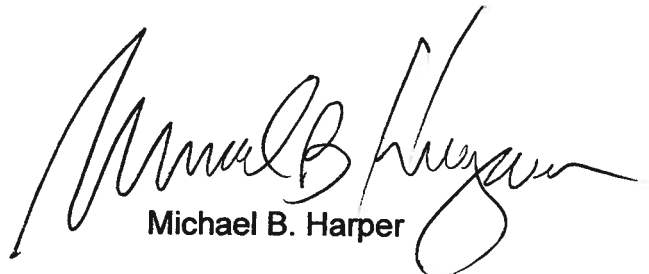
mike@harperauctionandrealty.com
harperauctionandrealty.com

4. **No notification of Contract Award:** As of the date of this letter (six days after the contract posting) I have received no notification either by mail, telephone or e-mail about the award of this contract. All three communication addresses and numbers are on my proposal. Since I have the right to protest the award, and only have ten days to do so, a notification of award is required. I had to constantly monitor the web site to be aware of the contract award.
5. **Equal or better qualifications:** I maintain that my qualifications are equal to or better than the company awarded the contract, and with the SC Resident Vendor Preference noted above, my score should have been higher. I am attaching a Freedom of Information Request to help me evaluate the relative qualifications.
6. **Monies owed to me by the State of SC:** I was never paid an agreed-upon administrative "no-sale" fee of \$5,000.00 that was agreed to prior to my advertising for the sale of the Sullivan's Island Quartermasters Warehouse and Dock property in July, 2007. My request for these funds has been ignored by the General Services Division to this day. Further, I contend that as the "Procuring Cause" of the pending contract with the Town of Sullivan's Island for the purchase of the Quartermaster's Warehouse and Dock in the amount of \$1,960,000.00, my contract commission (less the \$5,000.00 administrative "no-sale" fee, if paid prior to that closing) is due and payable to me upon closing.

Relief Requested: Cancellation of the current contract, and re-instatement of my prior contract, effective immediately. Further, that I be paid the agreed-upon \$5,000.00 administrative "no-sale" fee which was previously requested and ignored by General Services. Further, that I be treated as the "Procuring Cause" of the pending contract with the Town of Sullivan's Island for the purchase of the Quartermaster's Warehouse and Dock in the amount of \$1,960,000.00, and that my contract commission (less the \$5,000.00 administrative "no-sale" fee) be paid to me upon closing.

For these reasons, I believe Fisher's award to be in error and null and void. I have been aggrieved by this process. I request the specific relief cited above.

Thank you for your consideration. Please call or e-mail me if I can be of assistance or answer any questions.



Michael B. Harper